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## Scalia's Short Reply to 125 Years of Plenary Power

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# SCALIA’S SHORT REPLY TO 125 YEARS OF PLENARY POWER

MICHAEL SCAPERLANDA\*

## *Abstract*

*With its plenary power doctrine, the Supreme Court erred by rejecting the universal in favor of the particular. Liberal immigration theorists, on the other hand, make the opposite error by rejecting the particular in favor of the universal. Drawing on classic international law publicists and the Catholic philosophical tradition, this essay argues that the two concepts—the state’s greater duty toward its own citizens (the particular) and equal dignity and worth of all human beings (the universal)—go hand in hand: complementing each other and giving the state a qualified right to limit immigration along with a qualified duty to admit vulnerable émigrés.*

Footnote 1 of Justice Scalia’s opinion in *Arizona v. United States* serves as my point of departure. Scalia says:

Many of the 17th-, 18th-, and 19th-century commentators maintained that states should exclude foreigners only for *good reason*. Pufendorf, for example, maintained that states are generally expected to grant “permanent settlement to strangers who have been driven from their former home,” though acknowledging that, when faced with the prospect of mass immigration, “every state may decide after its own custom what privilege should be granted in such a situation.”<sup>1</sup>

Scalia mentions what he characterizes as “prudential limitations”<sup>2</sup> on the power to exclude aliens in the context of his argument that Arizona, like the United States, has a right inherent in sovereignty to exclude aliens from its territory “subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress.”<sup>3</sup>

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\* Gene and Elaine Edwards Chair in Law, University of Oklahoma College of Law. I would like to thank the Oklahoma Law Review for hosting this symposium and my fellow panelists for their insightful comments and engaging dialogue.

1. *Arizona v. United States*, 132 S. Ct. 2492, 2511 (2012) (emphasis added) (quoting 2 SAMUEL PUFENDORF, OF THE LAW OF NATURE AND NATIONS bk. III, ch. III, § 10, at 366 (C.H. Oldfather & W.A. Oldfather trans., 1934) (1688)) (Scalia, J., concurring in part and dissenting in part).

2. *Id.*

3. *Id.*

I won't focus on the merits of Scalia's argument that individual states within the United States retain sovereign powers to exclude.<sup>4</sup> My interest lies, instead, in his recognition that historically the sovereign power over immigration was limited—not plenary. This narrative, although presented in threadbare fashion in the footnote of a dissenting opinion, offers a corrective to 125 years of misguided sovereign absolutism.

The dominant narrative—the one that is the subject of this symposium—is succinctly summed up by the Supreme Court in the 1972 case of *Kleindienst v. Mandel*:

In accord with ancient principles of the international law of nation-states, the Court in *The Chinese Exclusion Case* [*Chae Chan Ping*] held broadly . . . that the power to exclude aliens is “inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government . . . .”<sup>5</sup>

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4. David Martin's symposium contribution provides an implicit reply. See David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 31 (2015) (*Chae Chan Ping* answered “a federalism question,” establishing “that the federal government in fact does possess the authority to regulate migration”).

5. 408 U.S. 753, 765 (1972) (citations omitted). In his contribution to this symposium, Kevin Johnson makes a forceful argument that, as a legal matter, the dominant narrative is muzzled by statutory and regulatory interpretation, lessening the harshness of plenary power's full potential. See Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 63-64 (2015) (“[T]he Court has, to a large extent, continued to bring U.S. immigration law into the jurisprudential mainstream.”); see also Martin, *supra* note 4, at 32 (“The litigation picture is not so bleak as often portrayed. Subconstitutional litigation is plentiful, with a significant success rate . . . .”); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545, 560 (1990) (“The principal decisions that have contributed to this expansion of judicial review in immigration cases have not been decisions of constitutional immigration law. Instead, they reached results favorable to aliens by interpreting statutes, regulations, or other forms of subconstitutional immigration law.”). My interest lies in the political/cultural effect of this narrative rather than its strictly legal effect. Margaret Taylor and Kit Johnson's contribution to the symposium, describing the conditions of confinement at Artesia, suggests that the dominant narrative has much purchasing power in shaping the cultural/political debate. Margaret H. Taylor & Kit Johnson, “*Vast Hordes . . . Crowding in Upon Us*”: *The Executive Branch's Response to Mass Migration and the Legacy of Chae Chan Ping*, 68 OKLA. L. REV. 185, 186 (2015) (moving beyond formal legal doctrine to assess the plenary power doctrine's influence on “the Executive Branch's policy response to mass migration”).

Since *Chae Chan Ping*, “[t]he Court without exception has sustained Congress’ plenary power” over immigration.<sup>6</sup> Since that time, this misinterpretation of the “ancient principles of international law of the nation-states” has led the Court to “repeatedly emphasize[] that ‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.”<sup>7</sup>

The plenary power doctrine was born in 1889 in the Chinese Exclusion Case, *Chae Chan Ping v. United States*.<sup>8</sup> In concluding that a long-term United States resident, Chae Chan Ping, was excludable from the United States on his return home after visiting China, the Court, quoting Chief Justice Marshall in *Schooner Exchange v. McFadden*,<sup>9</sup> said:

The jurisdiction of the nation within its own territory is necessarily *exclusive and absolute*. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.<sup>10</sup>

The Court, in *Chae Chan Ping*, failed to quote or explore the *Schooner* Court’s limitation of this supposedly “exclusive and absolute” right—“all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. This consent may, in

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6. *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972).

7. *Fiallo v. Bell*, 430 U.S. 787, 797 (1977) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

8. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

9. 11 U.S. (7 Cranch) 116, 136 (1812).

10. *Chae Chan Ping*, 130 U.S. at 604 (emphasis added). My focus is on the Supreme Court’s initial error in concluding that nation-states have an absolute right to exclude under international law. There are, however, at least two other bases for limiting the sovereign power to exclude: one that would have been available to the Court in 1889 and the other of more recent origin. First, the Court did not analyze whether the Constitution itself placed internal as opposed to external restraints on the ability to exclude. For example, does the Constitution’s equal protection norm forbid exclusion based upon race? See Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 976-77. Second, more recent cases, including *Kleindienst v. Mandel*, fail to address the rights revolution in international law over the past several decades, which limits the sovereignty of nation-states in ways that might be relevant to immigration. See *id.* at 1009-15.

some instances, be tested by common usage, and by common opinion, growing out of that usage.”<sup>11</sup> Instead, the *Chae Chan Ping* Court continued:

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.<sup>12</sup>

Therefore, if

the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.<sup>13</sup>

What are the “ancient principles of the international law of nation-states” regarding the international movement of persons? And, do *Chae Chan Ping* and its progeny correctly characterize these “ancient principles?” Or is there some merit to the hint of limited sovereignty found in both the *Schooner* case and Justice Scalia’s dissent in the *Arizona* case?

Three years after *Chae Chan Ping*, the Court held that

[i]t is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.<sup>14</sup>

A year later, the Court added that “[t]he right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards

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11. *Schooner*, 11 U.S. at 136.

12. *Chae Chan Ping*, 130 U.S. at 609. The Court did hint at some limiting principle, suggesting the exercise of this sovereign power was restricted, if at all, “only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.” *Id.* at 604. But, the Court explored neither constitutional limitations nor potential limitations controlling the “conduct of all civilized nations.”

13. *Id.* at 606.

14. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (citing Vattel and Phillimore).

becoming citizens of the country, rests upon the same grounds, and is as *absolute and unqualified*, as the right to prohibit and prevent their entrance into the country.”<sup>15</sup>

In *Fong Yue Ting v. United States*, the Court delved into International Law sources supposedly providing the footing for securing plenary power as “an inherent and inalienable right of every sovereign and independent nation.”<sup>16</sup> In that 1893 case, the Court quoted several “leading commentators,” including Emmerich de Vattel, at length:

Every nation has the right to refuse to admit a foreigner into the country, when he cannot enter without putting the nation in evident danger, or doing it a manifest injury. What it owes to itself, the care of its own safety, gives it this right; and, in virtue of its natural liberty, it belongs to the nation to judge whether its circumstances will or will not justify the admission of the foreigner.<sup>17</sup>

Three decades ago, Professor Jim Nafziger argued convincingly that the Court’s deeply embedded narrative was wrong—ancient principles of international law did not give sovereigns an exclusive and absolute plenary power over aliens but a qualified one. Nafziger said that

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15. *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) (emphasis added). Persons born in China were ineligible for citizenship until the passage of the Magnuson Act in 1943. See Chinese Exclusion Repeal Act (Magnuson Act), Pub. L. No. 78-199, 57 Stat. 600 (1943). The United States Naturalization Law of 1790, ch. 3, 1 Stat. 103, restricted naturalization to free white persons. After the Civil War, the ability to naturalize was extended to “aliens of African nativity and to persons of African descent.” Naturalization Act of 1870, ch. 254, 16 Stat. 254. The final racial restrictions on naturalization ended with the McCarran Walter Act of 1952. See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

16. *Fong Yue Ting*, 149 U.S. at 711. Distinguishing deportation from exclusion, three dissents rejected the notion of inherent sovereign powers, arguing that the power to deport “can be exercised only in subordination to the limitations and restrictions imposed by the constitution.” *Id.* at 738 (Brewer, J., dissenting); see also *id.* at 756-58 (Field, J., dissenting); *id.* at 762 (Fuller, C.J., dissenting). Victor Romero’s contribution to the symposium explores Justice Field’s transition from author of the majority opinion in *Chae Chan Ping* to dissenter in *Fong Yue Ting*. Victor C. Romero, *Elusive Equality: Reflections on Justice Field’s Opinions in Chae Chan Ping and Fong Yue Ting*, 68 OKLA. L. REV. 165, 166 (2015) (arguing that Justice Field “sought to balance his unfavorable personal and political views about mass Chinese immigration against his duty as a federal judge to uphold the constitutional rights of individual persons within the United States, regardless of their race and citizenship”).

17. *Fong Yue Ting*, 149 U.S. at 707 (quoting Vattel).

[w]hen authority is cited [for the proposition that a nation-state has the absolute right to exclude all aliens], by far the most frequent [authority] is Anglo-American case law from the period 1889-1893 [*Chae Chan Ping to Fong Yue Ting*] followed by highly selective snippets from the writings of Emmerich de Vattel, . . . and black-letter pronouncements apparently rendered *ex cathedra* by earlier publicists.<sup>18</sup>

In response to this and other selective quotations, Nafziger said, “Before the late 19th century, there was little, in principle, to support the absolute exclusion of aliens. . . . Biblical injunctions, which influenced the articulation of international law by 17th- and 18th-century publicists, favored free transboundary movement.”<sup>19</sup> Citing Hugo Grotius, Francisco de Vitoria, Samuel Pufendorf, and Vattel, Nafziger continued, “The Westphalian system of nation-states complicated the free movement of persons by confirming more rigid territorial boundaries. Significantly, however, the classic publicists, faced with a new tension between traditional freedom of movement and the emerging concept of the sovereign state, denied the state an absolute right to exclude aliens.”<sup>20</sup>

Vattel said that the sovereign

cannot, without particular and important reasons, refuse permission, either to pass through or reside in the country, to foreigners who desire it for lawful purposes. For, their passage or their residence being in this case an innocent advantage, the law of nature does not give him a right to refuse it.<sup>21</sup>

Nafziger concluded that Vattel’s nuanced argument—with its “synthesis of natural law and positivism”—was “misinterpreted” by the Court and later defenders of sovereign absolutism.<sup>22</sup> He suggested that “this distortion or selective reading of Vattel” might be due to “the . . . ascendancy of positivism, especially during the formative period of immigration law at the

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18. James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT’L L. 804 (1983).

19. *Id.* at 809.

20. *Id.* at 810.

21. *Id.* at 814 n.49 (quoting Vattel). Scalia renders this “good reason.” *Arizona v. United States*, 132 S. Ct. 2492, 2511 (2012).

22. Nafziger, *supra* note 18, at 811. “Vattel distinguished the internal law of nations, rooted in natural law, from the external law, rooted in what today one might call positivism. Internal law establishes sovereign duties as a matter of conscience and principle, whereas external law establishes sovereign rights as a matter of will.” *Id.* at 812.

end of the [19th] century. Concepts such as 'conscience,' 'duties of humanity,' and the like, vital to Vattel, were passe to the positivists."<sup>23</sup>

As David Martin has noted, the plenary power doctrine "remains stubbornly alive despite a steady barrage of academic criticism."<sup>24</sup> If, as the steady barrage of academic criticism<sup>25</sup> suggests, the Court erred in establishing [or in continuing to adhere to] the plenary power doctrine—in other words, if the rights inherent in sovereignty do not include an absolute and unqualified right to exclude or deport aliens—what resources are at our disposal to navigate the much murkier waters of a sovereign's qualified right to exclude and deport in a post-plenary power world? In short, by what criteria can we judge whether the state has—to use Vattel's test—"particular and important reasons" to exclude or deport?

Notice an assumption I am making. I am assuming that as a matter of political reality—and perhaps as a matter of right—the United States will continue to restrict immigration, treating some persons as insiders and others as outsiders. If I am right about this assumption, by what criteria do we decide how much immigration to allow and by whom?

Because so much of modern legal theory—including immigration theory—is grounded in liberal political theory,<sup>26</sup> liberalism would seem to be a leading candidate to provide a framework for immigration law and justice in a post-plenary power world. Viewing every rights-bearing

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23. *Id.* at 814-15. "Interpretations of Vattel's commentary on foreign migration have, however, consistently ignored both the subtleties on the duty side and his qualifications of the sovereign 'right' to exclude foreigners." *Id.* at 814.

24. David A. Martin, *Graduated Application of Constitutional Protection for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 53.

25. See, e.g., Nafziger, *supra* note 18; Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987); Motomura, *supra* note 5; Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996).

26. See e.g., Gila Stopler, *The Challenge of Strong Religions in the Liberal State*, 32 B.U. INT'L L.J. 411 (2014) (assuming that we live in a liberal state); Joshua D. Hawley, *The Intellectual Origins of (Modern) Substantive Due Process*, 93 TEX. L. REV. 275 (2014) (arguing that modern substantive due process is rooted in a "concept of liberty," which emphasizes "personal moral choice and autonomy"); JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS 82-83 (1998) (assuming that liberalism's "nonneutral principle of state neutrality" is "embodied in our federal Constitution"); BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1981); see also MEIRA LEVINSON, THE DEMANDS OF LIBERAL EDUCATION 4 (1999) ("[T]he politics of education provision in a liberal state should be guided by liberal principles.").

individual as having equal dignity and worth,<sup>27</sup> liberal theory is constructed from an atomistic anthropology, which views these individuals as free to live their lives (at least their private lives)<sup>28</sup> according to self-chosen ends

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27. See, e.g., Howard F. Chang, *Immigration Policy, Liberal Principles, and the Republican Tradition*, 85 GEO. L. J. 2105, 2113 (1997) [hereinafter Chang, *Immigration Policy*]. Who or what counts as a rights-bearing individual is contested, however. For example, Bruce Ackerman argues that “[c]itizenship [which gives rise to rights] . . . is a concept in political-not biological—theory,” so that “an individual who lacks dialogic competence fails to satisfy the necessary conditions for membership.” ACKERMAN, *supra* note 26, at 74-75. To paraphrase, “the idiot human” has no rights that the reasoning human is bound to respect. *Id.* at 79-80 (“The rights of the talking ape are more secure than those of the human vegetable. Citizenship is a matter of political, not biological, theory.”); cf. *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856) (“[Blacks] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.”) (superseded 1868). A constitutional, political, and cultural debate over when nascent human beings acquire rights has continued in the United States for over forty years. See e.g., William Saletan, *After-Birth Abortion: The Pro-Choice Case for Infanticide*, SLATE (Mar. 12, 2012, 11:14 AM), [http://www.slate.com/articles/health\\_and\\_science/human\\_nature/2012/03/after\\_birth\\_abortion\\_the\\_pro\\_choice\\_case\\_for\\_infanticide\\_.html](http://www.slate.com/articles/health_and_science/human_nature/2012/03/after_birth_abortion_the_pro_choice_case_for_infanticide_.html); John Breen & Michael Scaperlanda, *Never Get Out’a the Boat: Stenberg v. Carhart and the Future of American Law*, 30 CONN. L. REV. 297 (2006); Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women’s Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 599 & n.1 (1986) (arguing that “[t]he social determination of how the legal system should view the fetus should be informed by a careful consideration of all potential implications” and that “[t]he legal status that society chooses to confer upon the fetus is dependent upon the goals being pursued and the effect of such status on competing values”).

28. Liberalism, like in any other ideology, has the potential to succumb to the seductions of totalitarianism. “Even liberal ideology was dangerous, [Alexander Bickel] believed, because it had ‘pretensions to universality’ and was therefore inclined to become intolerant and oppressive. ‘Our problem,’ he wrote, ‘is the totalitarian tendency of the democratic faith.’” Richard Primus, Note, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423, 436 (1996) (quoting ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 12 (2d ed. 1962)) (“Two hundred years earlier, ideological liberalism had brought about the French Revolution, which, no matter what good it may have yielded, was unmistakably ‘the first of the totalitarian movements to drench the Western world in blood, particularly in our own century.’”). Many have argued forcefully and sometimes successfully that individuals give up their autonomy when they enter the public sphere, especially when they choose to engage in business. See, e.g., Nan D. Hunter, *Pluralism and Its Perils: Navigating the Tension Between Gay Rights and Religious Expression*, 15 GEO. J. GENDER & L. 435 (2014). The public/private divide is contested with some liberal theorists venturing far into areas like the family that many would have once considered private. See DWYER, *supra* note 26. Dwyer comes to what he describes as an inescapable conclusion “that the very notion of parental rights is illegitimate.” *Id.* at 63. Instead, he argues for a legal regime where the state grant licenses to “legally permit certain

untethered from tradition, community, faith, or family.<sup>29</sup> “The view of the self as an ‘autonomous and sovereign chooser is so deeply entrenched that in [early 21st] century America, at least, it is simply part of the cultural air that we breathe.”<sup>30</sup>

But, as Kevin Johnson suggests, a liberal framework has major drawbacks in the real world. Johnson argues that “[l]iberal theory, with its commitment to the protection of individual rights, finds it difficult to reconcile the rights of noncitizens with closed borders marked by numerous restrictions on entry.”<sup>31</sup> Bruce Ackerman put it succinctly: “I cannot justify my power to exclude you without destroying my own claim to membership in an ideal liberal state.”<sup>32</sup>

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adults to act as parents.” *Id.* at 64. For my critique of Dwyer, see Michael A. Scaperlanda, *Producing Trousered Apes in Dwyer’s Totalitarian State*, 7 TEX. REV. L. & POL. 175 (2002).

29. See, e.g., Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.–C.L. L. REV. 323, 363 n.159 (1987) (“The metaphysical underpinnings of liberal legalism are supplied by the central themes of that tradition: the notion that values are subjective and derive from personal desire, and that therefore ethical discourse is conducted profitably only in instrumental terms; the view that society is an artificial aggregation of autonomous individuals; the separation in political philosophy between public and private interest, between state and civil society; and a commitment to a formal or procedural rather than a substantive conception of justice.”); Joseph H. Carens, *Migration and Morality: A Liberal Egalitarian Perspective*, in FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND OF MONEY 25, 26 (Brian Barry & Robert E. Goodin eds., 1992) (“[L]iberal egalitarians care about human freedoms. People should be free to pursue their own projects . . . as long as this does not interfere with the legitimate claims of other individuals to do likewise. In addition, liberal egalitarians are committed to equal opportunity, . . . keep[ing] economic, social, and political inequalities as small as possible.”).

30. Jean Bethke Elshtain, *The Dignity of the Human Person and the Idea of Human Rights*, 14 J.L. & RELIGION 58 (1999-2000); cf. Chang, *Immigration Policy*, *supra* note 27, at 2112 (assuming that “we generally espouse” liberalism “in our political philosophy” but not in the immigration arena).

31. Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193 (2003); e.g., Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 85 (1984) (“[I]n a truly liberal polity, it would be difficult to justify a restrictive immigration law or perhaps any immigration law at all.”). Communitarianism, on the other hand, reinforces the Court’s absolutist version of plenary power. See MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

32. ACKERMAN, *supra* note 26, at 93. Reluctantly, Ackerman would limit immigration when the number of potential immigrants burgeons to a number threatening the ongoing viability of the liberal state. “The only reason for restricting immigration is to protect the ongoing process of liberal conversation itself.” *Id.* at 95 (emphasis in original). But, he understands that this answer is at odds with the liberal ideal because the excluded are “at least as good as we are.” *Id.*; see also Chang, *Immigration Policy*, *supra* note 27, at 2112

Howard Chang analogizes immigration restrictions with segregation: since “[i]mmigration restrictions keep disadvantaged groups of people in conditions of poverty and deprive them of equal access to important economic opportunities,” they “are much like laws mandating . . . residential segregation in the domestic context.”<sup>33</sup> Citing Rawls, Chang says “discrimination based explicitly on circumstances of birth [including location of birth] is at odds with liberal ideals.” “[P]lace of birth would appear to be a circumstance that [is] ‘arbitrary from a moral point of view.’”<sup>34</sup>

The problem with this reasoning is that we don’t live this way, and more importantly our experience and intuition—even the better angels of our nature—suggest that this way of thinking is not quite right. The circumstances of birth do matter morally as well as materially, at least to some extent. No one thinks twice about me expending my resources to feed, clothe, house, and educate my children to the exclusion or near exclusion of someone else’s child. In providing for my children, I’m worse off than some and better off than many. But, worse off or better off, I have a unique moral obligation to my children. In fact, I have a moral obligation to the community to meet my moral obligation to my children.<sup>35</sup> And, the law to some extent reinforces this obligation.<sup>36</sup>

Similarly, we know intuitively that the nation-state owes more to its citizens than it does to the citizens of other countries. In fact, it has a moral obligation to the global community to provide its citizens with the conditions for human flourishing. In both cases—of family and nation—my greater obligation to my own does not detract from the equal dignity and worth of those who are not my own.

The two concepts—greater duty to my own and equal dignity and worth of all human beings—go hand in hand, complementing each other. But as we have seen, liberal theory lacks the resources to properly balance these

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(“Liberal political theory creates a dilemma for the Court because liberal principles would seem to justify very little regulation of immigration.”).

33. Howard F. Chang, *The Economics of International Labor Migration and the Case for Global Distributive Justice in Liberal Political Theory*, 41 CORNELL INT’L L.J. 1, 12 (2008).

34. *Id.* at 13.

35. See, e.g., Deborah H. Bell, *Child Support Orders: The Common Law Framework—Part II*, 69 MISS. L.J. 1063, 1064 (2000) (“Blackstone described the father’s natural law duty to support children as a moral obligation stemming from responsibility for bringing the child into the world.”).

36. See *id.* at 1063 (“The duty of both parents to support a child is recognized and regulated by statute in every state today.”).

two complementary moral obligations. In adopting the plenary power doctrine, the Supreme Court erred by rejecting the universal in favor of the particular,<sup>37</sup> while immigration theorists working in the liberal tradition make the opposite error by rejecting the particular in favor of the universal.

Philosopher Alasdair MacIntyre suggests that if one's own tradition lacks the capacity to solve an intractable problem (and I suggest here the liberal political theory lacks the resources to solve the intractable problem of continuing restrictions on immigration), members of that tradition ought to look at rival traditions to see if they have the capacity to solve the problem in a more satisfactory way.<sup>38</sup>

The Judeo-Christian tradition provides such an alternate to the liberal tradition. A decade ago, University of Oklahoma law graduate—then-Tenth Circuit Judge, now President of Oklahoma City University—Robert Henry, quoted Leviticus:

If an alien will reside with you in your land, you shall not persecute him. The alien who resides with you shall be to you like a citizen of yours, and you shall love him as yourself, because you were aliens in the land of Egypt. I am the YWWH, your God.<sup>39</sup>

Judge Henry wrote this in a dissent in *Soskin v. Reinerstein* to remind the other two judges on the panel (a Catholic and a Jew) of their obligations to the alien.<sup>40</sup> For Christians,

The émigré Holy Family of Nazareth, fleeing into Egypt, is the archetype of every refugee family. Jesus, Mary, and Joseph, living in exile in Egypt to escape the fury of an evil king, are, for

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37. A modern communitarian alternative to liberalism supports the theoretical foundations of the plenary power narrative. See WALZER, *supra* note 31, at 61-62 (“[T]he right to choose an admission policy is . . . basic . . . . At stake here is the shape of the community that acts in the world . . . . Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be communities of character, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.”).

38. See ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 166-67 (1988).

39. *Soskin v. Reinertson*, 353 F.3d 1242, 1265 n.1 (10th Cir. 2004) (Henry, J., dissenting) (quoting *Leviticus* 19:33-34).

40. The Judeo-Christian tradition provides alternative narratives in many areas of law. See, e.g., Brian M. McCall, *Quas Primas and the Economic Ordering of Society for the Social Reign of Christ the King: A Third Perspective on the Bainbridge/Sargent Law and Economics Debate*, 47 J. CATH. LEGAL STUD. 369 (2008).

all times and all places, the models and protectors of every migrant, alien and refugee of whatever kind who, whether compelled by fear of persecution or by want, is forced to leave his native land, his beloved parents and relatives, his close friends, and to seek a foreign soil.<sup>41</sup>

Although the theological tradition of Judaism or Christianity may provide some inspiration for those operating from a secular framework,<sup>42</sup> it won't provide an authoritative voice for the liberal theorist because the theological tradition rests on divine revelation, not human reason. The vast philosophical resources of the Christian tradition, however, are available to all—including liberals—since these resources are grounded in reason, tradition, and experience rather than revelation. In fact, these were the resources lost in the Supreme Court's positivistic misunderstanding of the classic publicists, such as Grotius, de Vitoria, Pufendorf, and Vattel.<sup>43</sup> It is not surprising, therefore, that the Christian tradition—rather than the liberal tradition—sees clearly the deficiencies in sovereign absolutism's plenary power doctrine and can articulate an alternative narrative closely corresponding with our informed intuition that the universal is realized within the particular.

Like the liberal tradition, the Christian tradition recognizes the human dignity of every person.<sup>44</sup> But, unlike the mainstream of liberal thought, the

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41. Pope Pius XII, Apostolic Constitution *Exsul Familia Nazarethana* (Aug. 1, 1952), available at <http://www.papalencyclicals.net/Pius12/p12exsul.htm>; see also Pontifical Council for the Pastoral Care of Migrants and Itinerant People, *Erga Migrantes Caritas Christi* (The Love of Christ Toward Migrants), No. 15 (May 3, 2004), available at [http://www.vatican.va/roman\\_curia/pontifical\\_councils/migrants/documents/rc\\_pc\\_migrants\\_doc\\_20040514\\_erga-migrantes-caritas-christi\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/migrants/documents/rc_pc_migrants_doc_20040514_erga-migrantes-caritas-christi_en.html) (“In the foreigner a Christian sees not simply a neighbour, but the face of Christ Himself, who was born in a manger and fled into Egypt, where he was a foreigner, summing up and repeating in His own life the basic experience of His people”); PONTIFICAL COUNCIL FOR JUSTICE & PEACE, *COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH* ¶ 108 (2004) [hereinafter *COMPENDIUM*], available at [http://www.vatican.va/roman\\_curia/pontifical\\_councils/justpeace/documents/rc\\_pc\\_justpeace\\_doc\\_20060526\\_compendio-dott-soc\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html) (from ch. 3, part II.A, “Creatures in the Image of God”) (“The fundamental message of Sacred Scripture proclaims that the human person is a creature of God (cf. Ps 139:14-18), and sees in his being in the image of God the element that characterizes and distinguishes him . . .”).

42. For example, although he rejected Christian revelation, Richard Rorty viewed Christians as “toolmakers” working to alleviate “cruelty.” RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 55 (1989).

43. See Nafziger, *supra* note 18.

44. See, e.g., *COMPENDIUM*, *supra* note 41, ¶¶ 144-148 (from ch. 3, part III.D, “The Equal Dignity of All People”); John E. Coons & Patrick M. Brennan, *Nature and Human*

Christian tradition proposes that “humans are constituted through their associating” in societies.<sup>45</sup> I use Tom Hanks’ character in the movie “Castaway” to make this point to my students. Hanks’ character, Chuck Noland, is marooned on a deserted tropical island where he can meet all his material needs. If the Enlightenment’s versions of the State of Nature are correct, he should have no associational needs. But, given the reality of his social nature, he creates a sub-optimal association by painting a face on a Wilson-brand volleyball and naming it Wilson. In short, Noland craves a society and is in danger of going mad without it.

Exploring the work of Catholic philosopher Jacques Maritain, Patrick Brennan refers to society as “not a thing,” but “a range of activities,” which human persons must engage to be in tune with their nature.<sup>46</sup> In addition to marriage, family, and the Church, “there are also the schools, clubs, cloisters, sodalities, guilds, unions, and so forth—the countless societies men and women create, by reason and will, as time and circumstance allow or demand.”<sup>47</sup>

The “ordinary development of the human person” also requires “participation in society that is political.”<sup>48</sup> In this classical and Catholic tradition, “[p]olitical society is the architectonic society by which individuals, already associated in other societies (in which authoritative

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*Equality*, 40 AM. J. JURIS. 287, 288-89 (1995) (“From antiquity, religious believers and unbelievers alike have associated human dignity with those faculties—reason and will—that allow the self to commit either for or against a real good and thereby to advance toward or recede from moral self-perfection.”); Michael A. Scaperlanda, *Immigration Law: A Catholic Christian Perspective on Immigration Justice* in RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW 292, 302 (Michael A. Scaperlanda & Teresa Stanton Collett eds., 2007) (“With liberal egalitarians, but for very different reasons, Catholic Christians conclude that all humans have equal moral worth.”). Who counts as a rights bearing person, is, however, much contested in the liberal tradition.

45. Patrick McKinley Brennan, *The Contributions of Catholics to the Socio-Political Order*, 56 CATH. U. L. REV. 1221, 1225 (2007) [hereinafter Brennan, *Contributions*].

46. *See id.* at 1225.

[I]n the Catholic view, every kind of thing, whether it be carrot, cow, or human person, has its own *nature* or, as Maritain sometimes says, the “normality of its functioning.” Just as a piano functions normally or according to its nature only when it has the right number of strings and is in tune, so too the human person functions normally only when he is, as it were, “in tune”: nourished, physically healthy, and so forth.

*Id.* “To be ‘in tune,’ a human must also engage in society or, as I would prefer to say, *associate*.” *Id.* I refer to “normality of [human] functioning” as flourishing.

47. *Id.*

48. *Id.* at 1224 (“Lest the import of this claim remain dormant, allow me to repeat it: Political society is a demand of human nature itself.”).

government of a sort also occurs), use reason and will to create the conditions under which they can achieve their normality of functioning”—where they can flourish.<sup>49</sup> As Brennan puts it, “the state is not a whole, not a freestanding entity with its own rights, privileges, dignity, and perhaps even sovereignty.”<sup>50</sup> Rather, it is “a part of political society, part of the body politic.”<sup>51</sup> Specifically, “[i]t is the part of the body politic concerned with the good of the whole, or the common good.”<sup>52</sup>

These plural and diverse societies, including political society, have one thing in common—they have members. There are family members, Church members, members of the Rotary Club, members of the school or community choir, and members of the local, national, and international Teamsters Union. Membership implies the existence of non-members.<sup>53</sup>

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49. *Id.* at 1226. “[T]he word political means engaging together in self-government in order to realize individuals’ goods and the good that is common to all.” *Id.*

As opposed to the various totalitarian conceptions of political society in vogue today, the conception here is of a pluralist body politic bringing together in its organic unity a diversity of social groupings and structures, each of them embodying positive liberties. Civil society is made up not only of individuals, but of particular societies formed by them, and a pluralist body politic would allow to these societies the greatest autonomy possible and would diversify its own internal structure in keeping with what is typically required by their nature.

*Id.* at 1227 (quoting JACQUES MARITAIN, *INTEGRAL HUMANISM* 163-64 (Joseph W. Evans trans., 1968) (1936)).

50. *Id.* at 1229.

51. *Id.*; see also COMPENDIUM, *supra* note 41, ¶ 168 (from ch. 4, part II.C, “Tasks of the Political Community”) (“The State, in fact, must guarantee the coherency, unity and organization of the civil society of which it is an expression, in order that the common good may be attained with the contribution of every citizen.”).

52. Brennan, *Contributions*, *supra* note 45, at 1226. “One kind of society humans are both capable of forming and crave is the one we call political society, where the word political means engaging together in self-government in order to realize individuals’ goods and the good that is common to all.” *Id.* “What the person is doing in civil society, and what the legislator is doing in that part of civil society that we call the state, is implementing the natural law for the common good of society.” *Id.* at 1229.

53. Wendell Berry makes this point poignantly in his novel *Jayber Crow*:

If you have lived in Port William a little more than two years, you are still, by Port William standards, a stranger, liable, to have your name mispronounced. . . . [T]hough I was only twenty-two when I came to the town, many . . . would call me “Mr. Cray” to acknowledge that they did not know me well. . . . Once my customers took me to themselves, they called me Jaybird, and then Jayber. Thus I became, and have remained, a possession of Port William.

WENDELL BERRY, *JAYBER CROW* 11 (2000).

Just as there are nonmembers to a family and nonmembers to the Rotary Club, there are nonmembers—commonly called aliens<sup>54</sup>—to political society. This isn't simply how we live; it is who we are as human beings. "In other words, society, at least in potency, is as primordial and basic a reality as individual humans."<sup>55</sup>

Pace the liberal tradition, placedness-birth, family, community, membership in certain societies and not others—matters. Emigration involves a real loss to both the person leaving their political society and to the political society left behind.<sup>56</sup> And states have the right to control their borders, including limiting immigration that could threaten the well-being—the flourishing or normality of function—of a political society.<sup>57</sup>

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54. To some "the word 'alien,' even when not adorned with the modifier 'illegal,' has always struck a disturbing chord. Many feel that the term connotes dehumanizing qualities of strangeness or inferiority (space aliens come readily to mind) and that its use builds walls, strips human beings of their essential dignity, and needlessly reinforces an 'outsider' status." STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1-2 (5th ed. 2009). I disagree. "[I]n a very real sense 'alien' is an appropriate term for describing the relationship between the immigrant and his new country. Language, culture, history, and tradition often create a wide gulf between the migrant and the native. They do not yet belong to each other." Michael Scaperlanda, *Stirring the Melting Pot: A Recipe for Immigrant Acceptance*, 91 TEX. L. REV. 1171, 1182 (2013) (reviewing PHILIP KRETSEDEMAS, *THE IMMIGRATION CRUCIBLE: TRANSFORMING RACE, NATION, AND THE LIMITS OF THE LAW* (2012)); see also *Alien*, OXFORD ENG. DICTIONARY, <http://www.oed.com/view/Entry/4988?isAdvanced=false&result=1&rskey=7xc6tn&> (defining "alien" as one who belongs "to another person, place, or family; not of one's own; from elsewhere, foreign").

55. Brennan, *Contributions*, *supra* note 45, at 1227.

56. As Pope John Paul II wrote,

[Emigration] constitutes a loss for the country which is left behind. It is the departure of a person who is also a member of a great community united by history, tradition and culture; and that person must begin life in the midst of another society united by a different culture and very often by a different language. In this case, it is the loss of a *subject of work*, whose efforts of mind and body could contribute to the common good of his own country, but these efforts, this contribution, are instead offered to another society which in a sense has less right to them than the person's country of origin.

ST. JOHN PAUL II, *LABOREM EXERCENS* ¶ 23 (1981), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_14091981\\_laborem-exercens\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens_en.html); see also GUSTAVO PÉREZ FIRMAT, *NEXT YEAR IN CUBA: A CUBANO'S COMING OF AGE IN AMERICA* 22 (1995) (describing exiles as amputees) ("Just as people who lose limbs sometimes continue to ache or tingle in the missing calf or hand, the exile suffers the absence of the self he left behind."); Michael Scaperlanda, *Immigration and Evil: The Religious Challenge*, 83 U. DET. MERCY L. REV. 835 (2006).

57. See *Strangers No Longer: Together on the Journey of Hope: A Pastoral Letter Concerning Migration from the Catholic Bishops of Mexico and the United States* ¶ 36 (Jan.

Pace sovereign absolutism, the state lacks the exclusive and absolute right to exclude or expel nonmembers on behalf of the political society it serves<sup>58</sup> because the common good of a political society cannot be viewed in isolation of the good of nonmembers. The Catholic tradition expresses this through three interrelated principles—the universal destination of goods, the preferential option for the poor, and solidarity.

The Universal Destination of Goods posits that the earth and all its bounty are for the benefit of everyone.<sup>59</sup> This does “not mean that everything is at the disposal of each person or of all people.”<sup>60</sup> Although it qualifies the use of private property, the Universal Destination of Goods does not deny the rights of private property.<sup>61</sup>

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22, 2003) [hereinafter *Strangers No Longer*], available at <http://www.usccb.org/issues-and-action/human-life-and-dignity/immigration/strangers-no-longer-together-on-the-journey-of-hope.cfm> (“The Church recognizes the right of sovereign nations to control their territories but rejects such control when it is exerted merely for the purpose of acquiring additional wealth.”).

58. *Contra Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889).

59. See COMPENDIUM, *supra* note 41, ¶ 172 (from ch. 4, part III.A, “Origin and Meaning”) (“Each person must have access to the level of well-being necessary for his full development. The right to the common use of goods is the ‘first principle of the whole ethical and social order’ and ‘the characteristic principle of Christian social doctrine’ . . . It is first of all a *natural* right, inscribed in human nature and not merely a positive right connected with changing historical circumstances; moreover it is an ‘inherent’ right.”).

60. *Id.* ¶ 173 (“If it is true that everyone is born with the right to use the goods of the earth, it is likewise true that, in order to ensure that this right is exercised in an equitable and orderly fashion, regulated interventions are necessary, interventions that are the result of national and international agreements, and a juridical order that adjudicates and specifies the exercise of this right.”).

61. *Id.* ¶¶ 176-181 (from ch. 4, part III.B, “The Universal Destination of Goods and Private Property”).

Private property and other forms of private ownership of goods assure a person a highly necessary sphere for the exercise of his personal and family autonomy and ought to be considered as an extension of human freedom . . . stimulating exercise of responsibility, it constitutes one of the conditions for civil liberty.

*Id.* ¶ 176 (internal quotation marks omitted). Private property is a means for “*respecting the principle of the universal destination of goods*” and not an end in itself; therefore it is not absolute but “subordinated to the right to common use.” *Id.* ¶ 177. The rights of ownership also come with responsibilities respecting use: “Individual persons may not use their resources without considering the effects that this use will have, rather they must act in a way that benefits not only themselves and their family but also the common good.” *Id.* at ¶ 178; *cf.* Rose Cuison Villazor, *Chae Chan Ping v. United States: Immigration as Property*, 68 OKLA. L. REV. 137, 161 (2015) (noting that “‘social relations theory’ of property” shifts the emphasis from a “property as a relationship between a person and a thing” to a “relationship between persons with respect to valued resources”).

The Preferential Option for the Poor grows out of thick understanding of the Universal Destination of Goods. “[T]he principle of the universal destination of goods requires that the poor, the marginalized, and in all cases those whose living conditions interfere with their proper growth should be the focus of particular concern.”<sup>62</sup> Although rooted in the Church’s theology—“the exercise of Christian charity”<sup>63</sup>—the preferential option for the poor, along with the principles of the universal destination of goods and solidarity, corresponds with the intuition of liberal egalitarians.<sup>64</sup>

Solidarity highlights “in a particular way the intrinsic social nature of the human person [and] the equality of all in dignity and rights.”<sup>65</sup> Solidarity is “a moral virtue that determines the order of institutions.”<sup>66</sup> As an “authentic moral virtue,” solidarity requires “a firm and persevering determination to commit oneself to the common good. That is to say to the good of all and of each individual, because we are all really responsible for all.”<sup>67</sup>

These three principles not only limit a political community’s right to exclude would-be immigrants, they give these communities a duty to allow immigration where a) the receiving community has the ability to absorb immigrants, and b) the conditions in the sending country are such that the émigrés lack the resources to flourish normally as human beings with innate dignity. This obligation places special responsibilities on the United States. “More powerful economic nations, which have the ability to protect and feed their residents, have a stronger obligation to accommodate migration flows.”<sup>68</sup>

For “particular and important reasons,” the United States can and should restrict immigration because the universal dignity of the human person is

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62. COMPENDIUM, *supra* note 41, ¶ 182 (from ch. 4, part III.C, “The Universal Destination of Goods and the Preferential Option for the Poor”).

63. *Id.*

64. *See* Chang, *supra* note 33. It also corresponds to the impulse of Emperor Julian the Apostate who wanted to return the empire to paganism but retain aspects of Christian charity. *See Julian the Apostate*, NEW ADVENT ENCYCLOPEDIA, <http://www.newadvent.org/cathen/08558b.htm> (last visited Sept. 21, 2015) (stating that while rejecting Christianity itself, the Emperor Julian “urged pagans to imitate such Christian virtues as charity and mercy”).

65. COMPENDIUM, *supra* note 41, ¶ 193 (from ch. 4, part VI.B, “Solidarity as a Social Principle and a Moral Virtue”).

66. *Id.*

67. *Id.* (internal quotations omitted). Solidarity is not merely “a feeling of vague compassion or shallow distress at the misfortunes of so many people, both near and far.” *Id.* (internal quotations omitted).

68. *Strangers No Longer*, *supra* note 57, ¶ 36.

realized in the particulars of family, community, and—since the peace at Westphalia—the nation-state. But, prudential judgments about these matters cannot be made if we reject the universal in favor of the particular, or the particular in favor of the universal. Between plenary power's sovereign absolutism resting in the state and liberal theory's self-sovereignty, classical and Catholic resources offer a third narrative in which the universal dignity of the person is realized within particular political communities who achieve their own good partially by their openness to outsiders in need of the resources they possess in abundance. This third narrative corresponds more closely than the alternatives with our national self-understanding as expressed in Emma Lazarus' poem "The New Colossus"<sup>69</sup> and with our moral intuitions about the parameters of a just immigration policy.

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69. "Give me your tired, your poor, / Your huddled masses yearning to breathe free, / The wretched refuse of your teeming shore. / Send these, the homeless, tempest-tost to me, / I lift my lamp beside the golden door!" EMMA LAZARUS, *THE NEW COLOSSUS* (1883), available at <http://www.libertystatepark.com/emma.htm>.